(9)

No. 97-6146

In The

Supreme Court of the United States

October Term, 1997

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Had the jury and appellate courts in this case found sufficient evidence to prove the charged allegation, that finding would certainly bind defendant and preclude him from requesting a second chance to litigate the charge. The question here is whether a finding of insufficient evidence will similarly bind the state.

In this context, the Court has never before permitted the state repeated chances to prove a criminal allegation beyond a reasonable doubt when it has once failed to do so. The Court has never before permitted the state to ignore a jury's finding that the state has not proved its case. The Court has never before permitted the state to ignore a similar finding made by an appellate court.

Here, respondent and its amici ask the Court to do all three. Although they take slightly different approaches, their joint request for repeated chances to empanel a factfinder and prove sentence enhancement allegations is premised on two general points.

First, they argue that the "hallmarks of trial" test of *Bullington v. Missouri*, 451 U.S. 430 (1981) must be confined to capital cases. Respondent's Brief ("RB") at 4-13; Amicus Brief of Solicitor General ("SG") at 12-20; Amicus Brief of National Association of Attorneys General ("AG") at 15-27. Second, even if the hallmarks test did apply, California sentence enhancement trials do not have sufficient hallmarks to merit application of Double Jeopardy. RB at 13-19; SG at 21-22.

To its credit, respondent bluntly frames the rule it seeks. Respondent argues that Double Jeopardy permits

the state multiple opportunities to prove a sentence enhancement allegation even where a "jury has rejected the allegation." RB at 10. In other words, a jury's finding in favor of a defendant is constitutionally irrelevant, only jury findings in favor of the state count. As discussed below, neither of respondent's arguments supports adoption of this one-sided rule.

ARGUMENT

I. NEITHER PRECEDENT NOR POLICY WARRANT REFUSING TO APPLY DOUBLE JEOPARDY TO FULLY ADVERSARIAL NON-CAPITAL SENTENCE ENHANCEMENT TRIALS.

Respondent and two of its amici argue that the "hallmarks of trial" test of *Bullington v. Missouri*, 451 U.S. 430 applies only to capital cases. RB at 4-13; SG at 12-20; AG at 15-27. Three general reasons are put forth for this limitation.

First, they describe the inquiry made at such trials as one involving "status" only – whether defendant has a criminal record – and argue that determinations of status do not implicate Double Jeopardy concerns. RB at 9-10; SG at 18-19; AG at 10, 13-14. Second, they argue it would be unsound policy to hinge application of Double Jeopardy on the nature and type of inquiries mandated by state law. RB at 22; SG at 23; AG 24, 27. Third, their analysis of precedent shows that *Bullington* rested not solely on the presence of trial-like hallmarks, but on the presence of such hallmarks in conjunction with the ordeal of a capital case. SG at 9, 23-24; AG at 9, 18.

Each of these arguments will be discussed in turn. None support the conclusion that non-capital sentence enhancement trials are dress rehearsals at which a jury's verdict is respected only when it favors the state.[1]

A. The Vast Majority Of Non-Capital Sentence Enhancement Trials Involve Neither Prior Conviction Allegations Nor An Inquiry Into The Defendant's Status As A Prior Offender.

Respondent and its amici argue that the factual question to be decided at a sentence enhancement trial is merely one of "status." The jury is simply being asked to decide whether the defendant has suffered prior convictions. According to respondent, this inquiry is "divorced from the defendant's current crime." RB at 12; AG at 9. The simple and straightforward nature of this inquiry implicates none of the policies on which the Double Jeopardy Clause is premised. RB at 9-10; SG at 18-19; AG at 10, 13-14.

There are two fundamental problems with this argument. First, it is arbitrarily limited to sentence enhancement trials involving prior convictions. Significantly, however, the "question presented" by this Court for

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[1] One of respondent's amici breaks ranks and takes exactly the opposite position. "*Bullington* did not turn on any 'death is different' argument, instead relying primarily upon a 'hallmarks of the trial on guilt or innocence' standard." Amicus Brief of Criminal Justice Legal Foundation ("CJLF") at 4. With characteristic vigor, CJLF argues that any attempt to limit *Bullington* to the capital context "is a feeble, post hoc rationalization." *Ibid.*

review is **not** similarly limited, properly recognizing that many sentence enhancement trials have nothing whatever to do with prior convictions. Indeed, the Amicus Brief of the California Public Defender's Association ("CPDA") makes clear that the majority of sentence enhancement trials in California do not involve even the remotest inquiry into a defendant's "status." CPDA at 13, 20-21. Nor do they depend on facts which are "divorced from the defendant's current crime." Instead, they depend directly upon proof of the defendant's actions or mental state in the underlying, current crime. Thus, the suggestion that Double Jeopardy cannot apply to non-capital sentence enhancement trials because such trials involve a mere status inquiry is simply unfounded.[2]

[2] *See, e.g.*, Cal. Pen. Code § 667.8 (if state proves that defendant's intent in the current crime was to facilitate a sexual offense, 9 year enhancement is proper); Cal. Pen. Code § 12022.53(b) (if state proves that defendant used a firearm in the current crime, 10 year enhancement is proper); Cal. Pen. Code § 12022.53(c) (if state proves that defendant discharged a firearm in the current crime, 20 year enhancement is proper); Cal. Pen. Code § 12022.7 (if state proves that defendant inflicted great bodily injury in the current crime, three year enhancement is proper); *People v. Bright*, 12 Cal.4th 652 (1996) (if state proves that defendant premeditated in current charge of attempted murder, sentence may be enhanced to a life term).

The existence of enhancements which depend entirely on the way in which the current crime is committed is not limited to California. *See, e.g.*, 21 U.S.C. § 924(c) (if government proves that defendant carried or used a firearm in the current crime, a 5-30 year enhancement is proper depending on the type of weapon involved.) In no way can it be said that the proof of these sentence enhancements is "divorced from the defendant's current crime."

Even if the question presented for review is limited to trials on prior conviction allegations, however, the argument of respondent and its amici would still have to be rejected. Put simply, the Solicitor General and the state Attorneys General are understandably misinformed about the California scheme at issue in this case.

This may be because California's prior conviction statutes are unlike that of many other states. The California statute at issue here does **not** merely require the state to prove a requisite number of prior felony convictions. Instead, it requires the state to prove that the prior conviction was committed in such a way that it constitutes a "serious felony" as defined under California law. *See, e.g.*, Cal. Pen. Code § 667(a)(4), 667(d)(1).

Thus, under the California scheme, the defendant's status as a prior offender is simply a preliminary fact in the enhancement trial, and one that is usually undisputed. The jury's principal task at this trial is to make findings of historical fact concerning the conduct underlying the prior conviction. This very different inquiry requires the state to affirmatively introduce evidence showing how the prior conviction was committed. In other words, the California scheme does not require proof of a mere "status;" it requires proof of conduct underlying the prior conviction.

Indeed, the critical factual question resolved adversely to the state by the factfinder in a prior crimes sentence enhancement trial is rarely, if ever, the simple "status" question of whether defendant is a prior offender. Instead, it is whether the crime the defendant indisputably committed was committed in a way that makes it a serious felony. The

large number of published California cases on this question show that this inquiry has nothing to do with a defendant's "status" and is anything but simple and straightforward. *See, e.g., People v. Rodriguez*, 17 Cal.4th 253, 261-262 (1998); *People v. Best*, 56 Cal.App.4th 41 (1997); *People v. Williams*, 50 Cal.App.4th 1405 (1996); *People v. Marquez*, 16 Cal.App.4th 115 (1993); *People v. Jackson*, 7 Cal.App.4th 1367 (1992); *People v. Williams*, 222 Cal.App.3d 911 (1990); *People v. Brookins*, 215 Cal.App.3d 1297 (1989).

Where the prior conviction is a theft, for example, the state will often be required to prove defendant's specific intent at the time of the theft. *See, e.g., People v. Marquez*, 16 Cal.App.4th at 122-123; CPDA at 28. Where the prior conviction is a murder, the state may be required to prove defendant's mental state at the time of the homicide. *See, e.g., People v. Maldanado*, 186 Cal.App.3d 863, 866 (1986). Where the prior conviction is an assault, the state must prove that defendant personally used a weapon in the prior offense. *See, e.g., People v. Williams*, 222 Cal.App.3d 911. None of these inquiries have anything to do with defendant's "status" as a prior offender; to the contrary, each assumes that status to have been already proven.[3]

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[3] Respondent's subsidiary proposition – that proof of sentence enhancements is "divorced from the defendant's current crime" – is no more true in the limited confines of the prior conviction context. *See, e.g.*, Cal. Pen. Code §§ 667(a) (in order to enhance punishment for a prior conviction, the state must prove that the current crime was committed in a way that made it a "serious felony"); 667.7 (in order to enhance punishment for a prior conviction, the state must prove that the current crime involved infliction of great bodily injury or personal use of force); Cal. Health & Safety Code § 11370.2 (in order to enhance punishment for a prior conviction, the state must prove the nature of defendant's involvement in the current crime); *People v. Equarte*, 42 Cal.3d 456 (1986); CPDA at 23-24; *People v. Monge*, 16 Cal.4th 826, 862-863 (1997) (Werdegar, J. dissenting).

Respondent and its amici correctly note that the ordeal and anxiety suffered by a defendant at a non-capital sentence enhancement retrial is less than that of a defendant at a second capital sentencing hearing. RB at 12; SG at 18. Respondent explains that in the non-capital context, the defendant begins the sentence enhancement trial "having already suffered the embarrassment of the present conviction." RB at 11. Thus, there is only a "marginal increase in embarrassment" attributable to the sentence enhancement trial. RB at 11. The Solicitor General presents a similar rationale, noting that in non-capital cases, the defendant's primary "concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him." SG at 18. These rationales are posited as a reason that Double Jeopardy should not apply to non-capital sentence enhancement trials.

Once again, however, this reasoning is entirely inconsistent with state law. The vast majority of sentence enhancement allegations in California (1) have nothing to do with prior conviction allegations (2) depend entirely on how the defendant commits the current crime and (3) are tried at the same time and to the same jury that determines guilt of the underlying offense. For example, when a defendant is charged with a sentence enhancement for the use of a firearm, his fate on that allegation

depends entirely on the evidence introduced in connection with the underlying crime and is decided by the same jury at the same time. Thus, the suggestion that Double Jeopardy should not apply to non-capital enhancement trials because the defendant has "already suffered the embarrassment of the present conviction" is – as a matter of state law – wrong.

Indeed, even in the prior conviction context, respondent's rationale is frequently inapplicable. As petitioner noted in his opening brief, unless a party moves to bifurcate trial on a prior conviction allegation, the jury trial on this allegation will occur **at the same time as trial on the charged offenses**. *See People v. Calderon*, 9 Cal.4th 69 (1994); Pet. Br. at 37.

Ultimately, respondent and its amici cannot genuinely be arguing that the protections of Double Jeopardy depend on whether the trial court happens to bifurcate the proceedings. The inquiry into when the sentence enhancement trial is held is a red herring; the applicability of the Double Jeopardy Clause depends on the nature of the trial being held, not on when the trial occurs. As Justice Werdegar noted in her dissenting opinion below, "[i]n this era of 'Three-Strikes-and-You're-Out,' the mental torment faced by defendants in a bifurcated sentencing hearing to determine the truth of prior conviction allegations seems at least comparable to that faced by defendants at the guilt phase of trial." *People v. Monge*, 16 Cal.4th at 862. Given the extraordinary penal consequences entailed in many of the enhancement statutes – such as a 20 year term for firearm use or a 25 year-

to-life term for two qualifying prior convictions – Justice Werdegar was entirely correct.[4]

B. Where A State Chooses To Provide Certain Procedures Which Are Not Themselves Required By The Constitution, Those Procedures Must Comply With The Constitution.

Respondent and its amici argue that it would be unsound policy to hinge application of Double Jeopardy on the nature and type of inquiries mandated by state law. RB at 22; SG at 23; AG 24, 27. They argue that this would serve as a strong incentive for individual states to remove hallmarks as a way of avoiding the Double Jeopardy Clause. RB at 22; SG at 23; AG at 24, 27. In addition, amici warns against a parade of horribles; a hallmarks test would require individual application in 50 states and lead to unpredictable and unfair results. AG at 25-27.

The Court has explicitly rejected the "incentive" argument time and time and time again. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 726-727 (1992); *Evitts v. Lucey*, 469 U.S. 387, 400-401 (1985); *Irvin v. Dodd*, 366 U.S. 717,

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[4] Of course, the entire premise of respondent's argument is that the policies underlying Double Jeopardy do not apply to determinations of mere "status" such as age or the presence of prior convictions. Because the trial at issue here has little to do with status, there is no need to explore this premise in any depth. It is worth noting, however, that for many criminal offenses, proof of status – such as age or criminal history – is an element of the crime itself. *See, e.g.*, Cal. Pen. Code §§ 261.5(a), 271, 288a(b)(2), 290. This Court has never suggested that the state is entitled to multiple chances to prove these "status" elements once a defendant has been acquitted.

721-722 (1961); *Smith v. Bennett*, 365 U.S. 708, 714 (1961). The scope of constitutional protection applicable under a wide variety of constitutional protections depends entirely on what respondent refers to as the "particulars established by each state." RB at 22.

For example, the Constitution does not require states to provide an adversarial preliminary hearing. *Gerstein v. Pugh*, 420 U.S. 103 (1975). If the state chooses to do so, however, that hearing is subject to the Sixth Amendment right to counsel. *Coleman v. Alabama*, 399 U.S. 1 (1970).

The Constitution does not require a state to make malice an element of murder. *Patterson v. New York*, 432 U.S. 197, 198 (1977). If the state chooses to do so, however, that element is subject to the Fifth Amendment requirement of proof beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The Constitution does not require states to provide the right to appeal. *McKane v. Durston*, 153 U.S. 684, 687-688 (1894). If the state chooses to do so, however, that right is subject to the Fourteenth Amendment guarantees of Equal Protection and Due Process. *Evitts v. Lucey*, 469 U.S. at 400-401; *Griffin v. Illinois*, 351 U.S. 12 (1956).

The Constitution does not require states to provide a jury trial at the sentencing phase of a capital trial. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). If the state chooses to do so, however, that jury is subject to the Sixth Amendment requirement of impartiality. *Morgan v. Illinois*, 504 U.S. at 727.[5]

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[5] Similarly, prior to 1968 the Constitution did not require the use of jury trials in a State's criminal proceedings. *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968). If the state elected to do so, however, that jury was subject to the Sixth Amendment requirement of impartiality. *Irvin v. Dodd*, 366 U.S. at 721-722.

These examples should suffice. The argument that constitutional protections cannot hinge on the provisions of state law not only finds no support in the Court's precedents, but has been rejected again and again and again.

Nor does experience in these varied areas support the dire prediction that state legislatures will revise their statutes in order to avoid the Double Jeopardy Clause. In each of the cases cited above, it was the state's voluntary decision to provide certain procedures which subjected those procedures to limits imposed by the federal constitution. Yet there has been no rush by state legislatures to abolish adversarial preliminary hearings, redefine murder statutes to eliminate malice, abolish the right to appeal or do away with juries at capital sentencing. The suggestion that legislatures will revise their laws in order to avoid the commands of the constitution finds no support in any of these areas.

Nothing suggests state legislatures would take a different approach in the Double Jeopardy area. Indeed, the empirical data which does exist supports precisely the opposite conclusion.

As petitioner noted in his opening brief, the vast majority of jurisdictions already apply the hallmarks of trial test to determine the applicability of the Double Jeopardy Clause. Pet. Br. at 29-35. Despite this, to petitioner's knowledge **none** of the legislatures in any of

these states has ever "reconsider[ed] the discretionary procedural benefits they . . . grant to defendants in non-capital sentencing trial[s]." RB at 22.

This empirical evidence also compels rejection of the alternative suggestion that a hallmarks test would be difficult to apply and result in unpredictable outcomes. AG at 25-27. Virtually every jurisdiction to face the Double Jeopardy question **already applies** the hallmarks test. Pet. Br. at 29-35. The results are both consistent and predictable. Only where an enhancement trial provides procedures and requires proof like the trial on the question of guilt or innocence have courts held Double Jeopardy applicable. Pet. Br. at 30-34. Thus, there is no need to speculate on whether the parade of horribles envisioned by amici will occur; experience throughout the country has made clear it will not.[6]

C. *Bullington* Did Not Depend On The Capital Nature Of The Proceeding At Issue.

To its credit, the Solicitor General recognizes that had *Bullington* rested purely on the capital nature of the proceeding, it would have had to overrule *Stroud v. United States*, 251 U.S. 15 (1919). *See* Pet. Br. at 24-25. In nevertheless arguing that *Bullington* is limited to the capital context, the Solicitor General proposes that *Bullington* actually rested on two factors: the capital nature of the

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[6] The hallmarks test has been present in capital litigation since *Bullington*. Significantly, neither respondent nor its amici present any evidence that it has resulted in unpredictable or confusing results in the capital context.

proceeding **and** the presence of trial-like hallmarks. SG at 9, 23-24. The Solicitor General explains that Double Jeopardy did not apply in *Stroud* because it did not contain the second of these factors – the hallmarks of trial.

This explanation is entirely logical, as far as it goes. It fits *Bullington*'s treatment of *Stroud* into an analytic box that both reconciles *Stroud* and permits respondent's argument that *Bullington* was based – at least in part – on the capital nature of the proceeding at issue.

The analysis falls short, however, because it ignores three basic aspects of *Bullington*. First, it ignores *Bullington*'s treatment of *United States v. DiFrancesco*, 449 U.S. 117 (1980). If *Bullington* had genuinely rested on the combination of the capital nature of the inquiry and the trial-like hallmarks, the Court could have simply and easily distinguished *DiFrancesco* by relying on the non-capital nature of the sentencing decision at issue there.

Significantly, however, it did not. To the contrary, and in some detail, *Bullington* focused on the "hallmarks of trial" which were absent in *DiFrancesco*, primarily proof beyond a reasonable doubt. It then examined the role played by the factfinder in *DiFrancesco*. *Bullington v. Missouri*, 451 U.S. at 440-441. Of course, not a word of this discussion would have been necessary if *Bullington* had rested, even in part, on the capital nature of the punishment.

Second, the Solicitor General's interpretation of *Bullington* ignores statements made by both the *Bullington* majority and the dissent. The majority stated in no uncertain terms that "[b]ecause of our conclusion on the Double Jeopardy Clause issue, we have no occasion to

address petitioner's claims under the Sixth, Eighth and Fourteenth Amendment." *Bullington v. Missouri*, 451 U.S. at 446, n.17. Dissenting Justice Powell was just as clear, writing that "the Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is more of an ordeal in the legal sense than facing any other sentence a second time." 451 U.S. at 451.

Finally, it is significant that not a single case cited in *Bullington* rested on the Court's "death-is-different" jurisprudence. *Bullington v. Missouri*, 451 U.S. at 437-447. Instead, the Court relied on *Specht v. Patterson*, 386 U.S. 605 (1967), a case having nothing to do with capital jurisprudence. *Bullington v. Missouri*, 451 U.S. at 446.

The *Bullington* majority said it was not relying on the Eighth Amendment. The *Bullington* dissent said that the case did not depend on the capital nature of the penalty. Neither the majority nor the dissent cited a single Eighth Amendment case. Moreover, the vast majority of jurisdictions around the country have not confined *Bullington* to the capital context. Pet. Br. at 29-35. *Bullington* should not be confined to the capital context now.[7]

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[7] Also arguing that *Bullington* should be limited to the capital context, the National Association of Attorneys General suggests that the Double Jeopardy ruling in *Bullington* rests on the notion that "imposition of the death penalty is arguably part of the substantive offense of capital murder." AG at 9. Of course, this was exactly the argument made by capital defendants for years in arguing that the Sixth Amendment right to a jury trial required a jury to impose sentence. The Court has long rejected this argument. *See, e.g., Walton v. Arizona*, 497 U.S. 639, 647-649 (1990); *Spaziano v. Florida*, 468 U.S. at 464. *Bullington* plainly did not rest on this discredited theory.

II. THE CALIFORNIA SENTENCE ENHANCEMENT SCHEME CONTAINS ALL THE HALLMARKS OF A TRIAL ON GUILT OR INNOCENCE.

Assuming arguendo that *Bullington* is not limited to capital cases, respondent nevertheless argues that Double Jeopardy would not apply to California sentence enhancement trials because they do not have the hallmarks of trial. RB at 13-19. In advancing this thesis, respondent does not discuss the hallmarks provided at the actual sentence enhancement trial. RB at 13-19. As both the plurality and dissenting decisions below concluded after analyzing these hallmarks, sentence enhancement trials in California have all "the hallmarks of a trial on guilt or innocence." *People v. Monge*, 16 Cal.4th at 836, 870; JA 60, 116-117.

Of course, a state's highest court is the final arbiter of its own law. *Stringer v. Black*, 503 U.S. 222, 234 (1992). This plain statement by the California Supreme Court explains why, as the Solicitor General noted, "the question presented does assume that petitioner's sentencing proceeding had those hallmarks . . . . " SG at 21, n.8.

Instead of focusing on the hallmarks actually provided at the enhancement trial itself, respondent urges the Court to focus on the trial court's subsequent power to dismiss a sentence enhancement allegation in the interests of justice pursuant to California Penal Code section 1385. Respondent argues that this power renders Double Jeopardy inapplicable. RB at 13-18.

As an initial matter, respondent's premise is curious. Respondent purports to argue that California enhancement trials do not possess the hallmarks of a guilt/

innocence trial. To support this argument, respondent relies on a hallmark of trial – the power to dismiss under section 1385 – which state courts have long held applies equally to guilt/innocence and sentence enhancement trials. *See, e.g., People v. Superior Court (Romero)*, 13 Cal.4th 497, 508 (1996); *People v. Superior Court (Howard)*, 69 Cal.2d 491, 501-505 (1968) (court dismisses charged offense pursuant to section 1385); *People v. Cina*, 41 Cal.App.3d 136, 140 (1974).

Putting this aside, the factual predicate for respondent's argument is generally correct. With some exceptions, section 1385 authorizes trial courts to dismiss sentence enhancement allegations after the jury has found them true.[8]

Respondent's thesis is that dismissing such enhancements can lead to an increased flexibility at the actual sentencing hearing. RB at 13-18. Respondent and the Solicitor General both argue that petitioner has mistakenly focused upon the binary nature of the jury's actual verdict. Instead, they argue that the focus should be on the sentencing options which remain if a trial court

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[8] There are a number of statutory exceptions to this rule. *See, e.g.*, Cal. Pen. Code § 1385(b) and 667(a) (five year enhancement for a prior serious felony not subject to section 1385); Cal. Pen. Code § 12022.53(h) (10 and 20 year firearm use enhancements not subject to section 1385); *People v. Thomas*, 4 Cal.4th 206 (1993) (section 12022.5 firearm use enhancement not subject to section 1385). Under respondent's theory, because these enhancements could **not** be stricken under section 1385, Double Jeopardy would presumably apply.

subsequently exercises discretion to strike a prior conviction allegation after it has been found true. RB at 14, n.7; SG at 21-22.

Of course, the reason petitioner focused on the binary nature of the factfinder's actual sentence enhancement verdict is because it is that verdict to which Double Jeopardy should apply. A focus on the actual determination made by the factfinder – and the limited "yes/no" choice available to the factfinder – is appropriate precisely because it is this decision which should be subject to Double Jeopardy. Double Jeopardy applies to binary determinations of historical fact, not to a trial court's subsequent, discretionary sentence choices.

In support of its position, respondent reasons that if the trial court had exercised its discretion to strike the prior conviction allegation, a range of sentences would have been available to it. Since one of the main reasons Double Jeopardy does not apply to sentencing hearings is because the sentencer is exercising a broad ranging discretion, the discretion to strike the enhancement allegation brings non-capital sentencing enhancement trials within the safe harbor of traditional sentencing.

In a sense, of course, respondent is entirely correct. A trial court's discretionary decision at sentencing to strike a sentence enhancement allegation is not subject to Double Jeopardy protection. Nor is a trial court's discretionary sentencing decision subject to Double Jeopardy

protection. Both decisions may be appealed by the state under Penal Code § 1238(a)(10).[9]

Yet the existence of these normative sentencing procedures after a formal trial at which a jury renders a yes/no verdict on whether the state has proven its case is irrelevant to the Double Jeopardy question presented. The question is whether Double Jeopardy applies to the jury's verdict on the actual sentence enhancement, not whether it applies to the trial court's subsequent subjective sentencing decisions. The existence of such discretionary powers down the road at sentencing is irrelevant to the question of whether the factfinder's initial acquittal should or will be respected.

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[9] Respondent suggests in passing that a jury's finding of insufficient evidence to support a sentence enhancement may be appealed. RB at 18-19. The suggestion is wrong. The People may appeal a trial court's decision to dismiss a sentence enhancement allegation under section 1385. *See* Penal Code § 1238(a)(10). The People have no authority under that section, or any other provision of California law, to appeal a jury's finding that the state presented insufficient evidence to support a sentence enhancement.

CONCLUSION

The state was entitled to one bite at the apple. They are now asking for the entire bushel. The decision of the California Supreme Court should be reversed.[10]

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[10] Petitioner has addressed those portions of respondent's briefing which are responsive to the actual question presented by the Court in its January 16, 1998 order. He recognizes that, as a fallback position, respondent and one of its amici have asked the Court to overrule *Bullington*. RB at 20-22; CJLF at 1-30. This issue is not within the question presented by the Court. Nor was the issue raised in respondent's Brief in Opposition to Petition for Writ of Certiorari. As a general matter, when the Court wants briefing on whether a precedent should be overruled, and that issue has not been presented in either the certiorari petition or brief in opposition, the Court's practice is to issue an order directing the parties to address the issue. *See, e.g., Payne v. Tennessee*, 498 U.S. 1076 (1991); *Moragne v. United States*, 369 U.S. 952 (1969). *See generally* Stern & Gressman, Supreme Court Practice at § 6.25 at p. 341 (7th Ed. 1993).